FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET
FORM NLRB-501
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
01-CA-262242	6/26/2020

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Tesla Motors Inc

b. Tel. No.
(650) 681-5000

c. Cell No.

f. Fax No.

g. e-Mail

h. Number of workers employed
35

d. Address *(Street, city, state, and ZIP code)*
3500 Deer Creek Road
CA Palo Alto 94304-____

e. Employer Representative

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Construction

j. Identify principal product or service
Solar Energy

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

--See additional page--

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
(b) (6), (b) (7)(C) Title:

4a. Address *(Street and number, city, state, and ZIP code)*
(b) (6), (b) (7)(C)

4b. Tel. No. (b) (6), (b) (7)(C)

4c. Cell No.

4d. Fax No.

4e. e-Mail
(b) (6), (b) (7)(C)

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By (b) (6), (b) (7)(C)
(signature of representative or person making charge)

(b) (6), (b) (7)(C)
Title:
(Print/type name and title or office, if any)

Address (b) (6), (b) (7)(C)

06/26/2020 12:56:17
(date)

Tel. No.
(b) (6), (b) (7)(C)

Office, if any, Cell No.

Fax No.

e-Mail
(b) (6), (b) (7)(C)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Basis of the Charge

8(a)(1)

Within the previous six months, the Employer discharged an employee(s) because the employee(s) engaged in protected concerted activities by, inter alia, protesting terms and conditions of employment and in order to discourage employees from engaging in protected concerted activities.

Name of employee discharged	Approximate date of discharge
(b) (6), (b) (7)(C)	[redacted] 020
(b) (6), (b) (7)(C)	[redacted] 2020
(b) (6), (b) (7)(C)	[redacted] 2020

8(a)(1)

Within the previous six months, the Employer disciplined or retaliated against an employee(s) because the employee(s) engaged in protected concerted activities by, inter alia, protesting terms and conditions of employment and in order to discourage employees from engaging in protected concerted activities.

Name of employee disciplined/retaliated against	Type of discipline/retaliation	Approximate date of discipline/retaliation
(b) (6), (b) (7)(C)	Discharge	[redacted] 2020
(b) (6), (b) (7)(C)	Discharge	[redacted] 2020
(b) (6), (b) (7)(C)	Discharge	[redacted] 2020

Morgan Lewis

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August 11, 2020

VIA NLRB E-FILING & ELECTRONIC MAIL

Jennifer F. Dease
Field Attorney
National Labor Relations Board, Subregion 34
450 Main St Ste 410, Hartford, CT 06103

Re: Tesla Motors Inc., Case No. 01-CA-262242

Dear Ms. Dease:

Tesla Motors Inc. ("Tesla" or the "Company") provides this statement of position in response to the above-referenced charge filed by (b) (6), (b) (7)(C) and your letter dated July 21, 2020.[1] The charge alleges that Tesla violated Section 8(a)(1) of the National Labor Relations Act ("Act") by discharging (b) (6), (b) (7)(C), as well as (b) (6), (b) (7)(C) employees (b) (6), (b) (7)(C) in (b) (6), (b) (7) 2020, in retaliation for these individuals engaging in protected, concerted activities ("PCA") – namely raising purported concerns or complaints regarding COVID-19-related issues such as hazard pay, personal protective equipment, or other accommodations. In addition, your letter notes a Section 8(a)(1) allegation based on the Company's confidentiality instruction given during the investigation that led to the three employees' termination.

The charge lacks merit. The (b) (6), (b) (7) employees were terminated based on rampant and gross time fraud involving approximately (b) (6), (b) (7)(C) per employee, over approximately (b) months, due to their intentional miscoding of their "driving" hours as (b) (6), (b) (7)(C) hours eligible for a much higher rate of pay. These (b) (6), (b) (7) individuals were caught during a routine review of (b) (6), (b) (7)(C) versus onsite (b) work.

[1] The Company submits this position statement solely for the Board's use and requests that the Board preserve the confidentiality of the statement. To that end, the Company further requests that the Board not reveal any of this position statement's contents to any other person without the Company's prior written consent, subject of course to requests under the Freedom of Information Act. In addition, the Company reserves the right to supplement or amend this position statement, including its attachments, as necessary.

The Company's investigation and evidence of time fraud is summarized herein, and it alone renders the charge meritless.

While the Charging Party claims [redacted] and the other [redacted] employees engaged in various protected, concerted activities in response to COVID-19 issues, there is threadbare evidence of such activities. In any event, Tesla harbored no animus or hostility toward that limited activity as summarized in this position statement and shown in objective records. Moreover, there is no evidence linking any animus or hostility to the discharge decision premised entirely on the gross time fraud found during the Company's May investigation. The charge fails under the *Wright Line prima facie* elements, and assuming it survives, Tesla's legitimate basis for termination still renders the charge without merit.

So too does the claim that the Company investigator unlawfully orally requested confidentiality associated with the investigation during the interviews. Instead, that limited oral instruction was lawful because it was issued in, and limited to, that specific investigation. This allegation should be dismissed as well.

I. FACTUAL BACKGROUND

A. Tesla's Operations.

Tesla is a technology company, founded in 2003, with a goal of accelerating the world's transition to sustainable energy. In addition to Tesla's well-known automotive business, it operates a significant energy-focused business. That business includes both residential and commercial services for supercharging, industrial storage, and solar installations. The residential and commercial components of this business operate with some degree of separation from a managerial and operational perspective, although some products and resources overlap.

The commercial services team is divided into four regions throughout the United States on a geographic basis. Across those teams, Tesla employees approximately 100 [redacted] who work independently and often remotely on customer job sites. Tesla operates, however, certain warehouse and home location sites, including in Rocky Hill, CT. [redacted] had their [redacted]. [redacted]

Each of the four regions has a commercial field manager to whom the [redacted] report. [redacted]

B. (b) (6), (b) (7)(C) Hourly Pay Rates and Timekeeping Records.

(b) (6), (b) (7)(C) pay is hourly and based on the type of "work" being performed. All (b) (6), (b) (7)(C) in the United States use either the Kronos or Launchpad time keeping system. The two systems is the result of a merger with another legacy company that used the Kronos system. The Launchpad system generally contains more features and data on employee hours and work performed.

Employees catalogue their daily work activities by using a time keeping app available on a Company or personal electronic device. This app allows the (b) (6), (b) to record and differentiate between "driving time," (b) (6), (b) (7)(C) and "administrative" or "warehouse time." This differentiation matters significantly because, for some commercial-sector jobs performed for various local, state, or federal entities, the governmental customer imposes a "prevailing wage" requirement for (b) (6), (b) meaning that the basic or regular wage rate averaging between (b) (6), (b) per hour is greatly increased – in some cases between (b) (6), (b) *extra* per hour. When (b) (6), (b) are onsite and performing work at a prevailing wage rate job, they code their time as (b) (6), (b) (7) (b) (b) (6), (b) (7)(C), however, does not cover time spent driving to or driving from the prevailing wage project, which (b) (6), (b) are required to code as "driving time." "Driving time" is paid at the (b) (6), (b) regular wage rate. Thus, coding driving time as (b) (6), (b) (7)(C) time on a prevailing wage job (improperly) can result in a substantial difference in a (b) (6), (b) pay.

C. The COVID-19 Pandemic and the Company's Response.

Like many employees at many companies, Tesla's (b) (6), (b) (7)(C) have expressed various questions and/or concerns related to the COVID-19 pandemic. The Company has not deterred employees from raising these issues, and in fact has demonstrated its openness to employee questions and concerns. To that end, the Company created a special email address – COVIDHRAnswers@tesla.com – to enable employees to more easily raise COVID-19-related issues to the Company and receive a response. Of course, employees can also raise these issues with their supervisors and managers (as well as other employees and/or third parties), which they have also done and continue to do.

On (b) (6), (b) (7)(C) each separately emailed the COVIDHRAnswers email address with questions about receiving additional compensation – some form of "hazard pay." Exhs. A & B. HR Partner Imani Myers-Ferdinand responded to both emails the same day, thanking the employees for their emails and explaining the Company was

currently reviewing the pay premium program eligibility and an update would be provided as soon as possible. *Id.*[2]

There is no evidence anyone from the Company expressed any hostility toward (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) – or any other employee's – requests about hazard pay or any other COVID-19 related issues. In fact, the Company implemented premium pay for all (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) in May and June, including (b) (6), (b) (7)(C), who received this premium pay until their terminations on (b) (6), (b) (7)(C) for violating the Company's timecard policies. In addition, the Company – in response to (b) (6), (b) requests – obtained additional PPE and hand sanitizer in April/May and distributed the materials to all (b) (b)

D. Tesla Discharges (b) (6), (b) (7)(C) in Late (b) (6), (b) (7) 2020 After Finding Rampant, Gross Time Fraud.

In or around (b) (6), (b) (7)(2020, (b) (6), (b) (7)(C) began a national audit of (b) (6), (b) (7)(C) to assess average driving times and (b) (6), (b) efficiency, as requested by (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) pulled available records from the Launchpad system, given that it contained a more specific-breakdown on hours designation. Based on (b) (6), review, (b) (6) found (b) (6), (b) (6), (b) (7)(C) (out of all (b) (6), (b) (7)(C) who recorded little to no driving time from late January through (b) (6), review in mid-May. *See* Exh. C (May 20 email and excel attachment). Specifically, (b) (6), (b) (7)(C) determined that (b) (6), (b) (7)(C) all stopped recording any driving time as of (b) (6), (b) (7)(C) 2020, shortly after they jointly worked on a project at the (b) (6), (b) (7)(C) together. *See id.* (May 21 email). Instead, the (b) (6), (b) (7) (b) (6), (b) (7)(C) had put that time under (b) (6), (b) (7), thereby triggering the much higher prevailing wage rate for those hours when they worked at prevailing rate jobs over several months. These (b) (6), (b) had, however, properly reported (for the most part) driving hours *before* January 24, 2020. *See id.* (excel attachment). These (b) (6), (b) (7)(C) had sufficient experience and knowledge to know this coordinated effort was fraud, as evidenced in particular by the fact that they had previously reported their driving hours correctly. And, notably, (b) (6), (b) (7)(C) started to record driving time again on (b) (6), (b) (7)(C) 2020 – the same day that (b) (6), (b) (7)(C) took over – only to have driving time shut-off again several weeks later.

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[2] The Company has not located any documentary evidence of any COVID-19-related complaints submitted by (b) (6), (b) (7)(C) or any other documentary evidence of complaints by (b) (6), (b) (7)(C). (b) (6), (b) (7)(C), recall discussing COVID-19-related issues with employees generally on one or more conference calls in the March to May timeframe, but do not recall (b) (6), (b) (7)(C) specifically having raised any complaints. However, the Company is continuing to search its records and will supplement this position statement should it find any additional responsive records.

(b) (6), (b) (7)(C) also identified a (b) (6), (b) (7)(C), who had never recorded any driving time. *See id.* (May 20 email). (b) (6), (b) (7)(C) had just started working at the Company on (b) (6), (b) (7)(C), and (b) (6), (b) (7)(C) indicated (b) (6), (b) (7)(C) should be subject to investigation as well to confirm if had been coached improperly or otherwise had some legitimate explanation.

Accurate time recording is something the Company takes extremely seriously. The Company maintains an "Overtime and Recording Time Policy," which states employees are required to record their time accurately on their time cards. Exh. D. The policy also provides that "[t]ampering, altering or falsifying records may result in disciplinary action, including termination of employment. This includes falsifying time records, clocking in or out for someone else and/or knowingly approving inaccurate time cards." *Id.*[3]

The Company interviewed the (b) (6), (b) employees identified in the audit separately on (b) (6), (b) (7)(C) and took notes. *See* Exh. E. (b) (6), (b) (7)(C) on the residential side of the business, filled in because the HR Manager for the commercial side was not available. (b) (6), (b) (7)(C) also joined the interviews. During each interview, (b) (6), (b) (7)(C) told each employee that the Company's interview was confidential and should not be discussed. There was no written policy or instruction on confidentiality – only this oral instruction. A brief summary of each interview is below:

- (b) (6), (b) (7)(C) admitted that (b) (6) understood that the proper time code for recording time spent in a vehicle was "driving" and not "(b) (6), (b) (7) but denied that (b) (6) had stopped clocking driving times after (b) (6), (b) (7)(C) and stated (falsely) (b) (6) had been "punching in the same way my entire time here." Exh. E at 2. The Company's Launchpad records, however, show (b) (6), (b) (7)(C) had reported driving time before January 24, but do not show any driving time recorded by (b) (6), (b) (6), (b) (7)(C) after January 24. *See* Exh. C.

- In contrast to (b) (6), (b) (7)(C) denied knowing (b) (6) was required to record time spent in a vehicle as "driving time" and not (b) (6), (b) (7)(C) " and stated that (b) (6), had never used the "driving" time code. Exh. E at 3. However, (b) (6), (b) (7)(C) had regularly reported driving time prior to January 24. *See* Exh. C.

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[3] As noted in the text, (b) (6), (b) (7)(C) were the only (b) (6), (b) (7)(C) who the Company's audit found has been falsely recording driving time as (b) (6), (b) (7) time. The Company is continuing to search its records to identify any other examples of disciplines and/or terminations issued to commercia (b) (6), (b) (7)(C) who engaged in timecard fraud, or similar fraud. The Company is also searching its records for similar evidence on the residential services side of the energy business, which has some similar jobs and functions even though it is largely separate from a managerial and operational perspective.

- [redacted] acknowledged [redacted] was familiar with and had been trained on the Company's time recording procedures, but stated [redacted] had been told not to clock into driving and instead had been instructed to "clock into the job" (i.e., code time as [redacted] "from the time we leave the house, to the time we get home." Exh. E at 4. [redacted] indicated [redacted] had been following the practice of recording all of [redacted] time for a day, including vehicle time, as [redacted] for the past year and a half. *Id.* However, the Company's Launchpad records show [redacted] had reported driving time before January 24. Exh. C. Later in the interview, [redacted] contradicted [redacted] by admitting [redacted] knew the correct procedure was to record driving time separately, when asked why [redacted] had started reporting driving time again around April 7. [redacted] explained that [redacted] began recording driving time when [redacted] became [redacted] because [redacted] knew [redacted] was a "very strict manager and by the book," so [redacted] "wanted to make sure things were clocked correctly." Exh. E at 5.

Following the interviews, the Company determined that [redacted] engaged in gross time fraud. Specifically, the Company estimated that the fraud resulted in approximately [redacted] in extra pay respectively between [redacted] and [redacted] 2020. See Exh. F. The Company terminated [redacted] on [redacted] for violating the Company's timecard policies. Exh. G.

The Company also interviewed [redacted] who had only been working at the Company since [redacted]. The audit revealed that [redacted] had never reported driving hours, and [redacted] believed [redacted] may have been coached not to track driving time by the [redacted]. Exh. C (May 20 email). During [redacted] interview, [redacted] stated [redacted] did not know that time spent in a vehicle was required to be recorded as "driving time" rather than [redacted] which was consistent with [redacted] timecard reporting history, which did not show [redacted] had ever recorded any "driving time." Exh. E at 1.

Given that [redacted] had never recorded driving hours – unlike [redacted] who had properly recorded driving hours prior to January 24 – the Company had insufficient evidence that [redacted] intentionally failed to report driving time, as compared to not knowing better, and decided to issue [redacted] a <u>final</u> written warning for violating the Company's Overtime and Recording Time Policy. The final written warning stated the Company had "serious concerns" regarding [redacted] failure to accurately record [redacted] time, "which if not improved could lead to termination of employment." Exh. H. [redacted] was warned that "[a]ccurate time keeping is a requirement of your employment and it is your responsibility to ensure accuracy every time you submit your time for payment. Time manipulations or inaccurate time keeping is not acceptable & will not be tolerated at Tesla." *Id.*

II. DISCUSSION

A. Tesla Discharged the (b) (6), Named Individuals for Time Fraud – Not for Engaging in Protected, Concerted Activity or to Discourage Such Activity.

1. (b) (6), (b) (7)(C) Has Not Established a *Prima Facie* Case of Unlawful Discrimination.

In order to show unlawful discrimination with employee terminations, there must, at a minimum, be protected activity, knowledge of that activity by the employer, and employer animus or hostility toward that activity. *See Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 7 (2019); *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Additionally, a Section 8(a)(3) or (1) discrimination violation necessarily requires (b) (6), (b) (7)(C) to demonstrate "a nexus between the employee's protected activity and the challenged adverse employment action." *Tschiggfrie*, above, slip op. at 7.

a. Tesla Did Not Bear Any Animus Toward (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) for Protected, Concerted Activities. [4]

(b) (6), (b) (7)(C) cannot establish a *prima facie* case under the *Wright Line* standard because there is no evidence that Tesla bore any animus toward any COVID-19-related complaints raised

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[4] On the first two *Wright Line* threshold elements, the two emails sent by (b) (6), (b) (7)(C) to the Company's "COVIDHRAnswers" email address are the only documentary evidence the Company has been able to locate regarding COVID-19-related complaints raised by any of the (b) alleged discriminatees. The key decision-makers in this case – (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) – are not aware of any COVID-19 complaints specifically made by (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) The two emails, by themselves, are not alone sufficient to establish "concerted" activity. *See, e.g.*, *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 7 (2019) (an individual complaint does not qualify as concerted activity "solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun"); *see also Bud's Woodfire Oven LLC d/b/a Ava's Pizzeria*, 368 NLRB No. 45, slip op. at 1 fn. 3, 6 (2019) (to qualify as PCA, the employee "must be actually, rather than impliedly, representing the views of other employees") (citations omitted); *7 Gates Mediterranean Grill*, Case 13-CA-255603, NLRB Advice Memorandum (June 30, 2020) (the Board has never held that discussions of health and safety issues are "inherently concerted").

Additionally, the two emails do not, by themselves, establish knowledge on the part of the individuals who actually made the decision to terminate (b) (6), (b) (7)(C). As noted above, (b) (6), (b) (7)(C), the (b) (6), (b) (7) individuals who participated most closely in the termination decisions, do not recall any COVID-19-related concerns being raised by (b) (6), (b) (7)(C) including these two emails to another internal Tesla address. *See Tomatek, Inc.*, 333 NLRB 1350, 1353 (2001) ("[C]redible proof of 'knowledge'

by (b) (6), (b) (7)(C) . *See In re Tomatek, Inc.*, 333 NLRB 1350, 1355 (2001) ("[E]ven where knowledge has been established, the failure to make a credited showing of animus will likewise warrant dismissal of the complaint.").

The Company is not aware of any supervisor or manager, especially (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) expressing hostility toward employees who raised COVID-19 concerns.[5] If anything, the evidence shows just the opposite. From the start, the Company has demonstrated its openness to employee questions and concerns regarding the pandemic, including by setting up a special email address where employees can raise concerns and the Company can address them. (b) (6), (b) (7)(C) both used that email address to raise their concerns relating to premium pay, and rather than expressing any hostility to those concerns, the Company responded that it was reviewing eligibility for the pay premium program and would provide an update as soon as possible. And in fact, in May, the Company implemented premium pay for all (b) (6), (b) in May and June, and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) received the extra pay before their terminations on (b) (6), (b) (7)(C). Additionally, in response to concerns raised by (b) (6), (b) (7)(C), the Company located extra hand sanitizer and PPE in April and May and distributed those items to all (b) (6), (b) .

Further, (b) (6), (b) (7)(C) has not – and cannot – establish that (b) (6), (b) (7)(C) were treated differently from other similarly situated employees. *St. Clair Memorial Hospital*, 309 NLRB 738, 743 (1992) (noting the General Counsel's failure to prove disparate treatment in finding that employer met the *Wright Line* burden upon proof that the employer treated employees alike). While (b) (6), (b) (7)(C) , was given a final written warning rather than terminated, (b) (6), comparative lack of experience and the fact that (b) (6) had never recorded driving time mean that (b) (6), was not similarly situated to (b) (6), (b) (7)(C)

In the absence of any evidence of animus towards the alleged protected activity, there is no *prima facie* case. *See In re St. Vincent Med. Ctr.*, 338 NLRB 888, 895 (2003) (finding that the General Counsel had failed to demonstrate animus on the part of the employer and therefore had failed to establish a *prima facie* case); *Joshua Assocs.*, 285 NLRB 397, 399

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is a necessary part of the General Counsel's threshold burden and without it, the complaint cannot survive.").

For purposes of this position statement, the Company presumes, *arguendo*, that the Region has additional evidence indicating some protected concerted activity by (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) The charge can easily be dismissed for other reasons explained herein, although Tesla reserves the right to argue that these threshold *Wright Line* elements are missing.

[5] If the Region has received any evidence that shows animus, the Company respectfully asks to be informed on such evidence and have the opportunity to respond in writing and/or via affidavit before the Region's merit determination.

(1987) (General Counsel failed to establish a *prima facie* case "[i]n view of the virtual absence of credible evidence of union animus").

b. [redacted] Has Failed to Demonstrate Any Nexus Between the Alleged Protected Activity and the Terminations.

[redacted] also has failed, based on the available evidence, to demonstrate any nexus between the alleged PCA and the late [redacted] 2020 discharges. In fact, the only evidence of a nexus [redacted] can identify is that the discharges occurred at some point after some alleged PCA occurred. However, well-established precedent dictates that temporal proximity, alone, is insufficient to establish an interference of unlawful motivation. *See, e.g., U.S. Cosmetics Corp.*, 368 NLRB No. 21, slip op. at 2 (2019) (finding timing of wage increases alone was insufficient to show they were announced and implemented to discourage union activity); *Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1024 (1999) ("The record in this case shows nothing more than the timing of [the employee's] discharge shortly after the representation election was a coincidence. Such a coincidence, at best, raises a suspicion.

However, 'mere suspicion cannot substitute for proof' of unlawful motivation."). The Company is not aware of any evidence of relevant supervisors or managers expressing hostility toward [redacted] in connection with their raising COVID-19-related concerns, and the fact that these [redacted] employees were terminated approximately one month after [redacted] of them raised questions related to COVID-19 premium pay is insufficient to show the Company harbored animus toward these employees merely because they raised issues related to COVID-19.[6]

2. Tesla Properly Terminated the Named Individuals for Time Fraud.

Even if [redacted] could establish a *prima facie* case – which [redacted] cannot – Tesla can rebut the allegation by establishing that it would have taken the same adverse action even in the absence of the protected activity. *See NLRB v. Transportation Management*, 462 U.S. 393, 401 (1983) ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). Tesla's demonstration that the terminations would have "taken place even in the absence of protected conduct" provides a complete defense to an alleged violation of Sections 8(a)(1) or 8(a)(3). *Wright Line*, 251 NLRB at 1089; *see also Cardinal Home Prods., Inc.*, 338 NLRB 1004, 1008 (2003) (stating employer may still defend the charge "[by] asserting a legitimate reason for its decision and showing by a

[6] The Company is also searching its records for examples of [redacted] on the commercial services side of the energy business who have raised specific COVID-19-related complaints in writing.

preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation").

When an employer's disciplinary actions are consistent with a lawfully-maintained policy, there is no violation of the Act. *See In re Far W. Fibers, Inc.*, 331 NLRB 950, 950 (2000) (finding no violation of the Act because employer's suspension of employee, even if motivated by employee's union activity, was consistent with employer's disciplinary policy and thus employer showed that it would have issued such discipline even in the absence of employee's union activity).

It is undisputed that the Company maintained an Overtime and Recording Time Policy stating that "falsifying time records … and/or knowingly approving inaccurate time cards" could result in discipline, including termination of employment. It is also undisputed that (b) (6), (b) (7)(C) failed to record time spent driving to and from jobs as "driving time" and instead recorded those hours as (b) (6), (b) (7)(C) which they admitted in their interviews, and which was false and inaccurate and resulted in each employee receiving *thousands of dollars of unearned pay from January to May*. The Company is not aware of any past instances of timecard fraud involving comparable circumstances or scale within the (b) (6), (b) (7)(C) group on the commercial side of the energy business.[7]

Finally, the fact that new employee (b) (6), (b) (7)(C) was not terminated but instead received a final written warning does not undermine the Company's *Wright Line* defense. The final written warning explained the seriousness of (b) (6), (b) (7)(C) violation of the Overtime and Recording Time Policy, and that (b) (6), continued failure to accurately record (b) (6), driving hours would lead to termination. Unlike (b) (6), (b) (7)(C) – who were experienced employees and had regularly reported their driving hours prior to January 24 – (b) (6), (b) (7)(C) was a recent hire and claimed unawareness that (b) (6) was required to report driving time separately from working time. Under these circumstances, (b) (6), (b) (7)(C) failure to accurately record (b) (6), driving hours lacked the same element of intentionality as the misconduct engaged in by (b) (6), (b) (7)(C), and therefore the Company's different treatment of (b) (6), (b) (7)(C) was entirely justified.

B. Tesla Lawfully Instructed the Individuals to Maintain Confidentiality During the Time Fraud Investigation.

Tesla understands (b) (6), (b) (7)(C) to further allege that the Company violated the Act when (b) (6), (b) (7)(C) orally requested that (b) (6), (b) (7)(C) (and allegedly the other

[7] As noted above, the Company is in the process of searching for other past instances of timecard fraud or other fraud involving commercial (b) (6), (b) (7)(C), and will supplement its response should it locate any such records. The Company is also searching for similar records involving residential (b) (6), (b) (7)(C)

employees) maintain confidentiality associated with the investigation. The Board in *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019), recently held that employer rules concerning confidential workplace investigations are analyzed under the framework described in *Boeing Co.*, 365 NLRB No. 154 (2017). Applying this framework, the Board concluded that investigative confidentiality rules that "apply for the duration of any investigation" fall under Category 1 – meaning they are lawful to maintain. *Apogee Retail*, above, slip op. at 1. Importantly, the Board noted that an employer's "substantial and compelling business justifications" for investigative confidentiality rules outweigh the "comparatively slight impact" on employees' restrictions from discussing an investigation while it is pending. *Id*., slip op. at 8.

Here, the Company acknowledges that (b) (6), (b) (7)(C) instructed the employees during the interview to maintain confidentiality associated with an investigation that involved potential collusion or collaboration between several employees to steal money through time fraud. However, (b) (6), (b instruction did not violate the Act. The Board in its recent *Watco Transloading LLC*, 369 NLRB No. 93, slip op. at 9 (2020) decision held that an oral instruction of this nature, issued in, and limited to, a single, specific investigation, is reasonably construed as limited to that investigation and lawful under the Act.

In *Watco*, the employer's human resources representative told an employee during a telephone interview that the employer "was conducting a confidential internal investigation" and the employee "was absolutely forbidden to discuss any of this conversation with anyone." *Id.*, slip op. at 8. The Board found the oral confidentiality instruction was lawful because there was no evidence the instruction was not limited to the term of the employer's investigation. *Id.* at 8-9. The employer's reason for giving the instruction – that there was a risk of employees' coordinating their stories or suggesting helpful interview answers to others – naturally would apply only while the investigation remained active, which would have been apparent to the employee under the circumstances, and there was no evidence the confidentiality ban extended beyond discussion of the interview and what was said there, that it applied to anyone but the employee, or that it prohibited the employee from discussing the incidents that gave rise to the investigation. *Id.* at 9.

Here, (b) (6), (b) (7)(C) verbal confidentiality instruction to the employees during each interview was limited to the Company's investigation of the failure to report driving time. The durational limit of this instruction would have been apparent to the employees not only based on the content of the instruction itself, but also under the circumstances. The Company was investigating a time fraud scheme by employees that had started after they worked on a job together, and with real risk of the employees coordinating their stories or suggesting self-serving interview answers. Further, the verbal instruction did not extend beyond discussion of the interviews and what was said there, and nothing in the instruction suggested it applied to anyone but the individual employee being interviewed, or that it

even prohibited them from discussing the incidents that gave rise to the investigation. For all of these reasons, this allegation should be dismissed, absent withdrawal.

C. The Allegations Do Not Warrant Section 10(j) Relief.

You also asked us to address the appropriateness of injunctive relief under Section 10(j) of the Act. In short, Section 10(j) relief would not be appropriate in this case. Section 10(j) is an "extraordinary remedy" that should only be granted under "very limited circumstances." *See Arlook ex rel. NLRB v. S. Lichtenberg & Co.*, 952 F.2d 367, 374 (11th Cir. 1992) (citations omitted); *Szabo ex rel. NLRB v. P*I*E Nationwide, Inc.*, 878 F.2d 207, 209 (7th Cir. 1989) (citations omitted). Courts have denied injunctive relief in cases where, as here, there is no union organizing or activity involved. *See, e.g.*, *Sharp v. Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1040 (8th Cir. 1999) (refusing to grant 10(j) injunction "when there was no collective bargaining in process, no recognized or certified union, no on-going organizing activities, no showing of strong union support ..., and only one union activist discharged"); *McKinney v. Velox Express, Inc.*, 2017 WL 5069112 (W.D. Tenn. June 29, 2017).

In the First Circuit, 10(j) relief is appropriate only where (1) there is reasonable cause to believe the charged party committed the alleged unfair labor practice; and (2) injunctive relief would be "just and proper." *Pye ex rel. NLRB. v. Sullivan Bros. Printers*, 38 F.3d 58, 63 (1st Cir. 1994) (citations omitted). Here, neither element is met.

First, there is no reasonable cause to believe the Company has committed any unfair labor practice. As discussed above, (b) (6), (b) (7)(C) claims that (b) (6), (b) (7)(C) were terminated for engaging in protected concerted activity are not supported by the evidence. *See Sullivan Bros.*, 38 F.3d at 63 (to establish reasonable cause, an unfair labor practice allegation must be "fairly supported by the evidence"). (b) (6), (b) (7)(C) cannot establish a *prima facie* case under the *Wright Line* standard because there is no evidence the Company bore any animus or hostility toward (b) (6), (b) (7)(C) – or any other employee's – raising questions or concerns about COVID-19-related issues. This is a case, at most, where the charging party can identify some form of PCA engaged in prior to being discharged. But that element alone falls far short of establishing a *prima facie* case.

Even if (b) (6), (b) (7)(C) were able to establish a *prima facie* case, the Company would have terminated the (b) (6), (b) (7) employees because of their timecard fraud. (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) were the only (b) (6), (b) employees the Company's audit revealed as failing to report driving hours and misreporting driving time as (b) (6), (b) (7)(C), which resulted in them receiving grossly-higher-than-eligible pay. This specific type of timecard fraud was unprecedented at the Company, at least within the commercial (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) ranks. (b) (6), (b) (7)(C) was not terminated, but instead received a final written warning, because (b) (6), (b) (7)(C), and the Company's investigators believed it was

plausible [redacted] did not know how to properly record [redacted] driving time, particularly given that the Company found no evidence [redacted] had ever done so during [redacted] employment.

In addition, as explained above, the evidence also fails to establish a violation of the Act with respect to the verbal confidentiality instruction given by [redacted] while interviewing [redacted] during the Company's timecard fraud investigation.

Second, injunctive relief would not be "just and proper" in this case. Establishing that injunctive relief is "just and proper" requires: (1) a likelihood of success on the merits; (2) the potential for irreparable injury in the absence of relief; (3) that such injury outweighs any harm preliminary relief would inflict on the defendant; and (4) that preliminary relief is in the public interest. *Sullivan Bros.*, 38 F.3d at 63. In cases such as this one, where the interim relief would be "essentially the final relief sought, the likelihood of success should be *strong*." *Id.* (quoting *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 25 (1st Cir. 1986)).

Here, the evidence does not establish any likelihood of success – much less a *strong* likelihood of success – for the reasons discussed above. Thus, injunctive relief is not supported for that reason alone. *See Sullivan Bros.*, 38 F.3d at 67 (denying 10(j) injunction where the record did not establish "a clear likelihood of success").

Further, the potential for irreparable injury does not exist because a Board order issued after the Board's normal processes would provide an effective remedy here, even assuming the Board were to ultimately find Sandberg's allegations have merit. *Pye ex rel. NLRB v. Excel Case Ready*, 238 F.3d 69, 75 (1st Cir. 2001) ("Section 10(j) interim relief is designed to prevent employers from using unfair labor practices in the short run to permanently destroy employee interest in collective bargaining…. [Sec.] 10(j) relief is *not* designed to address harm to particular employees."); *see also Velox Express*, 2017 WL 5069112 at *5 (denying 10(j) relief despite finding reasonable cause to believe the employer violated the Act by implementing a rule that prohibited employees from discussing work concerns with other employees and third parties and by terminating an employee for engaging in protected concerted activity that did not involve union organizing, because the Board's normal remedies – including backpay, reinstatement, and rescission of any unlawful "rules" – would be effective even absent an injunction).

As to the remaining two factors, requiring the Company to reinstate [redacted] employees who engaged in substantial, repeated time fraud in order to receive thousands of dollars in wages they were not entitled to poses a significant risk of harm to the Company. In contrast, as noted above, the potential for irreparable injury if injunctive relief is not granted is negligible, because the Board's remedial powers will be preserved regardless of the entry of an injunction. For this reason as well, the public interest factor does not support injunctive relief here.

Accordingly, Section 10(j) relief should not be pursued for this charge, even if the Region were to otherwise find merit to one or more allegations.

III. CONCLUSION

This is a case where employees caught committing gross time fraud are seeking some forum to fight the discharges, but the NLRB is not a proper forum. The Company respectfully requests that the Region dismiss the Charge as without merit, absent withdrawal.

Please let us know if you have any questions or need any additional information to complete the Region's investigation.

Sincerely,

/s/ David R. Broderdorf

David R. Broderdorf

cc: Lauren Emery

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August 21, 2020

VIA NLRB E-FILING & ELECTRONIC MAIL

Jennifer F. Dease
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National Labor Relations Board, Subregion 34
450 Main St Ste 410, Hartford, CT 06103

Re: Tesla Motors Inc., Case No. 01-CA-262242

Dear Ms. Dease:

Tesla Motors Inc. ("Tesla" or the "Company") provides this supplemental statement of position for the Region's consideration. This submission addresses the remaining items related to the Company's August 11 position statement and includes answers to the Region's August 12 questions.

Comparator employees disciplined or discharged for time fraud

Tesla has not located any recent discipline for time fraud within the commercial (b) (6), (b) (7)(C) group (b) (6), (b) (7)(C). Tesla has, however, identified (b) (6), (b) recent terminations for falsifying time cards that serve as comparators for the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) terminations. Tesla terminated (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) 2020 for time card falsification. (b) (6), (b) (7)(C) was caught leaving the warehouse one day to visit a friend, while clocking in for 8 hours of time. *See* Exhibit I. Tesla also terminated (b) (6), (b) (7)(C), on (b) (6), (b) (7)(C) 2020 for time card falsification. (b) (6), (b) (7)(C) noticed a discrepancy on an (b) (6), (b) (7)(C) time card, where (b) (6), (b) (7)(C) entered 8 hours of regular time in addition to (b) (6), paid time off. This led (b) (6), (b) (7)(C) to conduct a broader audit of time cards from (b) (6), (b) (7)(C) to (b) (6), (b) (7) (b) (6), (b) (7)(C) with warehouse security camera footage. The audit identified approximately 36 hours of time fraud by the employee within that one-month window. While (b) (6), (b) (7)(C) alleged (b) (6) had "continued to work from home" after leaving, (b) (6) produced no evidence of such work and Tesla terminated (b) (6), (b) (7) *See* Exhibit J.

Notably, both discharges occurred with the involvement of (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) who also was the (b) (6), (b) (7)(C) for the discharges of (b) (6), (b) (7)(C)

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(b) (6), (b) (7)(C). The amount of time fraud at issue – in dollars – in both cases pales to the amount of time fraud with (b) (6), (b) (7)(C). The Company submits that these recent terminations reinforce the Company's defense under the *Wright Line* test, assuming the *prima facie* elements were met for all (b) employees, and provide additional grounds to dismiss the current charge given the comparator evidence. *St. Clair Memorial Hospital*, 309 NLRB 738, 743 (1992) (noting the General Counsel's failure to prove disparate treatment in finding that employer met the *Wright Line* burden upon proof that the employer treated employees alike).

Documentary evidence of any COVID-19-related complaints submitted by (b) (6), (b) (7)(C) (b) (6), (b) (7)(C)

On August 11, Tesla provided the Region with two individual emails that (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) sent to the covidhranswers@tesla.com email address on April 30, 2020. Those emails, as discussed in the Company's position statement, raised questions or comments about premium pay, to which a Tesla representative responded and thanked each employee for their submission. And as mentioned, Tesla instituted premium pay for commercial (b) (6), (b) shortly thereafter.

After August 11, Tesla continued to review its email and other communication records for other responsive material. We located no other responsive communications from (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) to covidhranswers@tesla.com or (b) (6), (b) (7)(C). As for (b) (6), (b) (7)(C) we located the following. There was a "chat" exchange between (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) that began on (b) (6), (b) (7)(C) and ended on (b) (6), (b) (7)(C) *See* Exhibit K. The original purpose of the chat was to discuss schedules and assignments, but later in the chat (b) (6), (b) (7)(C) raised the following concern:

- "When corona is over and it's no thing to stay in hotels twice a week … I think that would be a better time to tackle jobs so far."

(b) (6), (b) (7)(C) responded to the chat comment about two hours later that noted in part:

- "If travel is an issue during Covid19 please also reach out and we can have a separate conversation, as we have now provided PPE / Premium. There is also a [sic] unpaid leave option, along with using your PTO. Thanks."

(b) (6), (b) (7)(C) responded the next morning, May 7, noting that:

- "Traveling during covid is an issue," and stated that "if this is how it's going to be will look into the pto/unpaid leave options for covid."

(b) (6), (b) (7)(C) sent a separate chat message to (b) (6), (b) (7)(C) making clear that:

- "If you are unwilling to perform the work assigned to you, you are free to use your PTO or take unpaid leave until the entire Covid-19 ends. Let me know if you would like to take this route and we will take you off the schedule for the foreseeable future."

(b) (6), (b) (7)(C) also noted in the same message that (b) (6) viewed (b) (6), (b) (7)(C) comments and tone about (b) (6), travelling and hotel stays as reflecting a "negative attitude." Even so, (b) (6), (b) (7)(C) made clear that (b) (6), (b) (7)(C) still had the option to work or instead take time off based on (b) (6), personal concerns over COVID-19. (b) (6), (b) (7)(C) responded later that morning by first stating:

- "I will not cross state lines and I will not stay in hotels during covid-19," but then (b) (6) added 10 minutes later that "I take that back," and "[I] WILL cross state lines if asked and I'll work something out with hotels."

The same morning – (b) (6), – (b) (6), (b) (7)(C) separately emailed covidhranswers@tesla.com to confirm "what options are available to help keep my family safe during these times." *See* Exhibit L. But about an hour after sending the email, (b) (6), (b) (7)(C) wrote back to "retract" (b) (6), original email and stated that "[m]anagement has made it very clear to me of my options." *Id.* It appears (b) (6), (b) (7)(C) was referring to the several options that (b) (6), (b) (7)(C) wrote in the chat conversation that morning.

The chat exchanges and email from (b) (6), (b) (7)(C) that Tesla located after additional review does not, upon review, support a *prima facie* case as related to (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) termination for time fraud. First, the conversation does not reflect protected, concerted activity by (b) (6), (b) (7)(C) on behalf of other employees or to initiate group action on some defined issue. Rather, the conversations involve personal gripping and/or statements *about Gandara's own* assignments, work-related travel, and COVID-19 issues. As the Division of Advice recently made clear in the *Hornell Gardens*, LLC, 03-CA-258740 dismissal email, dated July 31, 2020, similar activity by employees focused on their personal issues or reactions – even when linked to COVID-19 concerns that other employees may share or discuss – is not concerted and does not trigger the Act's protection:

- An employee's adverse reaction to sharing nurses gowns based on "personal disgust" and the potential harm to the employee and (b) (6), family.

- An employee refusing to work a scheduled shift based on concerns over exposure to a patient who tested positive, even when the employee claimed the goal of "educating coworkers" on COVID-19 dangers.

- An employee confronting management on COVID-19 issues, not as a group or any planned group event, and without any claim that they were speaking on behalf of a group or others on such issues.

As in *Hornell Gardens*, the Region should conclude that the [redacted] electronic conversations Tesla has located do not involve concerted activity by [redacted] Relatedly, the Region should conclude that [redacted] viewing [redacted] comments on work assignments or travel as reflecting a "negative attitude" is not evidence of animus against protected, concerted activity under *Wright Line*, but instead a legitimate managerial response to how [redacted] approached [redacted] own concerns and demands in the chat program.

In addition, the electronic exchanges cited above do not implicate [redacted].

Region's August 12 questions

1. **Are there any other emails to the CovidHRAnswers email from any other [redacted] supervised by [redacted]?**

   Response: Yes. The Company performed a broad search of the COVIDHRAnswers emails and located three emails from [redacted] within the [redacted] organizational structure:

   - On [redacted] asked whether there was "any plan" to supply Tesla workers with PPE such as hand sanitizer and gloves. Exh. M. [redacted] also copied [redacted] other Tesla employees, [redacted] [redacted] on [redacted] email. On [redacted] the Company responded, copying [redacted] management team, including [redacted], and [redacted] [redacted] (who reports to [redacted] and explaining that additional materials had been ordered and [redacted] leadership would be able to share more specific information. *Id.*

   - On [redacted] raised a concern about reduced work hours. Exh. N. On April 4, the Company responded explaining if there was no "essential" work for employees to complete the Company would provide them with paid time off. *Id.* The Company also noted that if there was work and an employee felt uncomfortable and would prefer to stay home the employee could use their PTO. *Id.*

   - On [redacted] indicated that "[d]ue to concerns relating to Coronavirus," [redacted] was remaining on leave until further notice. Exh. O.

   The timecard records for both [redacted] were reviewed as part of the Company's audit, and [redacted] employees were found to "[p]roperly track[ ] Driving Hours." *See* Exh. C. [redacted] timecard records were not reviewed because [redacted] is assigned to a warehouse in San Diego, California and [redacted] review did not cover all [redacted] in the U.S., but rather around 60%,

with inclusion based at least in part on availability of Launchpad versus Kronos records. (b) (6), (b) (7)(C) are still employed by the Company.

2. **The position statement states that (b) (6), (b) (7)(C) was directed to conduct an "exercise" into drive times; please provide those records, including emails, texts or other documents that show when (b) (6), (b) (7)(C) was directed to perform this investigation, who directed (b) (6), (b) to conduct the exercise and that show any instructions given regarding the scope, method or manner of the investigation.**

Response: On (b) (6), (b) (7)(C) 2020, (b) (6), (b) (7)(C) colleague (b) (6), (b) (7)(C) (b) (6), (b) (7)(C)), who reports to (b) (6), (b) (7)(C) , sent an email noting the "action item" for an audit of (b) (6), drive times and related time records as follows:

3. Efficiency
   a. Start (b) (6), (b) onsite vs. offsite time deep-dive (@ (b) (6), (b) (7)(C) @ (b) (6), (b) (7)(C)

See Exhibit P. This request led to (b) (6), (b) (7)(C) reviewing (b) (6), (b) (7)(C) time records, which are being provided in response to Question 6 below.[1] We have not located any other documents regarding any other instruction to initiate the investigation or scope thereof. We have, however, provided the Region on August 11 and herein with documents and data showing the investigation's scope, analysis and conclusions.

3. **Who are (b) (6), (b) (7)(C) and what were their roles in the investigation or decision making process? Are there any email responses to the (b) (6), (b) (7)(C) email from (b) (6), (b) (7)(C) to (b) (6), (b) (7)(C) et al about (b) (6), recommendation to terminate and discipline the employees? Any there any other documents, emails, texts or reports of findings showing the conversation between (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) referenced in this (b) (6), (b) (7)(C) email, and showing what they relied upon to make their recommendation in this (b) (6), (b) (7)(C) email?**

Response: (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) . Both individuals were informed of the investigation and the investigation outcome, but neither was directly involved to the level of (b) (6), (b) (7)(C) .

[1] The Company's August 11 position statement noted that the audit originated in April, but that understanding was based on memory and without having yet located the May 11 email now provided to the Region. Further, (b) (6), (b) (7)(C) did not send the (b) (6), (b) (7)(C) email summarizing the audit action item, but (b) (6) was copied on the email and supported the audit.

(b) (6), (b) (7)(C) would ordinarily have served in the HR role for the investigation, but (b) (6), (b) was out on paid time off the week the investigation occurred, and in (b) (6), place (b) (6), (b) (7)(C) from the residential organization filled in and assisted the management team in conducting and completing the investigation as summarized in the Company's August 11 position statement.

Based on our review, there is no additional emails to (b) (6), (b) (7)(C) or responses from either individual other than those provided to the Region already.

4. **Were any other (b) (6), (b) (7)(C) interviewed regarding their time card practices? If so, please provide the notes and recordings of those interviews.**

   Response: The Company did not interview any other employees during the (b) (6), (b) (6), (b) (6), (b) (7) investigation besides (b) (6), (b) (7)(C), as those were the individuals identified as having driving time/(b) (6), (b) (7)(C) issues in the time records reviewed during (b) (6), (b) (7)(C) audit.

5. **Was there any consideration given to the employees' claims that they were directed to not use "drive time" in the commercial division unless it was for traveling to jobs that were out of state and that would require traveling most of the day and their claims that they were instructed not to use "drive time" for day to day in and around travel to and from job sites? Additionally, was there any consideration or investigation done into the claim that in New York, electricians appropriately earn prevailing wages for drive time or travel time to and from a job site?**

   Response: Yes. Tesla looked closely at the issues raised during the investigation, including potential for confusion on time instructions or an alleged entitlement in New York State to the much-higher prevailing wage rate while driving to/from a job site.

   On the matter of internal instructions, the Company is not aware of any supervisor or manager directing employees to not use "drive time" for time spent in their vehicles, especially for prevailing wage jobs where that distinction has such critical impact on wage rates. (b) (6), (b) (7)(C) are instructed to clock in for certain time spent traveling (such as when an employee's time spent commuting between home and a job site exceeds the employee's normal commute from home to his or her assigned Tesla warehouse, when an employee travels between job sites during the day, and for work travel involving an overnight stay) "Clock in" does not mean (b) (6), (b) (7)(C)." Employees are aware that they must log their hours for

each day to the appropriate task. The Company's Clocking SOP defines "driving time" as follows:

Task Code Name	Allocated?	Scheduled Activity	Use Case
Driving	Allocated	All Activities	Travel time to job site ⚠ Clock into driving after you turn on ignition and buckle your seatbelt change out of driving task code when you put the car in park at job site before you unbuckle your seatbelt

Exh. Q. Additionally, the employees' apparent claim that they were instructed not to record "drive" time unless for out-of-state travel are not credible given that (i) during their [redacted] interviews they did not identify the individual (or individuals) who purportedly directed them not to use "drive time"; [redacted] all regularly recorded driving time prior to January 24; (iii) [redacted] admitted that [redacted] began logging driving time after [redacted] took over as [redacted] because [redacted] knew [redacted] was "by the book" and [redacted] "wanted to make sure things were clocked correctly," *see* Company's August 11 position statement at 6, Exh. E at 5; and (iv) other [redacted] properly record their driving time.

On the issue of special rules within New York State, [redacted] contacted [redacted] a Tesla Regulatory Compliance Analyst, during the late May investigation to discuss the issue. [redacted] asked [redacted] to confirm, as per existing policy, that New York State did not require employees to be paid the much-higher prevailing wage amount when driving to or from a prevailing wage site. While [redacted] was highly confident that existing policy complied with New York State law, [redacted] contacted the New York State Department of Labor (NYS DOL) for additional confirmation. [redacted] spoke with [redacted], [redacted] from the NYS DOL, based on previous dealings with [redacted]. [redacted] confirmed that Tesla policy is lawful and in compliance with New York State prevailing wage requirements (namely that the higher prevailing wage is only required when employees are physically on a public works site performing construction related tasks). Based on our review, there is no email or written correspondence on this exchange. This verbal confirmation from New York State, however, reinforced Tesla's position that it (1) had a lawful, compliant policy and (2) the [redacted] subject to the investigation violated that policy and grossly increased their wages earned based on the deviation.

6. **I previously requested the underlying time card records for the period January 2020 to the present. Since [redacted] exercise may cover a longer time period and since [redacted] seems to rely on the a review of FSTs time cards for a significant period of time before January 2020 in making [redacted] disciplinary recommendations, I expand my original request for the actual time card records for each FST for the same period of time reviewed by [redacted] in [redacted] investigation (which appears to at least go back through early Fall 2019)**

   Response: Attached here are the time card records reviewed by [redacted] during [redacted] audit of the relevant [redacted] files. *See* Exhibit R. The time card records are organized into one consolidated PDF file, presented in the same format that [redacted] used during the investigation. While the file is large, the data is grouped by employee name and searchable. If the Region would like time card information provided in a different format, please let me know.

   In addition to the raw time records, we have prepared seven reports of raw time data *for driving time and* [redacted] *only* (produced from the master report provided) that correspond with the [redacted] alleged discriminatees [redacted] [redacted]) and [redacted] other [redacted] *working in the same or similar regions and routinely assigned to prevailing wage jobs* [redacted] *See* Exhibit S. Many [redacted] outside of the Northeast and West Coast work in regions without prevailing wage jobs, and while properly recording driving time is important, any failure to distinguish between driving and [redacted] in time records has no impact on wage rates or compensation.[2] As the Region will see, the other [redacted] comparable [redacted] all consistently recorded and distinguished between driving time and [redacted], while the [redacted] discharged employees failed to do so – *and importantly all failed to do so after an apparent coordinated effort starting on or after January 24, 2020*. And [redacted] *switched back* to recording driving time for a short period in April, after [redacted] took over and [redacted] was concerned about [redacted] strictly enforcing the rules, but then again stopped inputting driving time as mentioned above. This objective evidence of time abuse, which [redacted] discovered during [redacted] legitimate audit and the related investigation, is what led to their termination – not any alleged or actual protected, concerted activity they engaged in weeks or months earlier.

   Please note that the time records being provided to the Region are equivalent to payroll documents and fall under FOIA Exemptions 4, 6, and/or 7(c). We have inserted a corresponding notation in these exhibits. We understand that the Region

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[2] In addition, at times some [redacted] perform training or product-support activities that do involve customer sites and do not result in daily driving time or [redacted] entries.

will apply 29 C.F.R. § 102.117(c)(iv) and all other applicable FOIA regulations and internal procedures to afford Tesla notice and the opportunity to provide evidence as to why FOIA Exemptions 4, 6, and/or 7(c) would apply to such materials, if the NLRB receives a future FOIA request for information related to Case No. 01-CA-262242, or any related case.

7. **Are there recordings of the termination conversations between (b) and discriminatees? If so, please provide the recordings.**

   Response: Tesla did not make any recording of the investigation or termination meetings, and the issue of recordings was not discussed. The meetings occurred remotely, and it is unknown if (b) (6), (b) (7)(C) secretly recorded the discussions without Tesla's knowledge.

Please let us know if you have any questions or need any additional information to complete the Region's investigation.

Sincerely,

David R. Broderdorf

David R. Broderdorf

cc: Lauren Emery

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
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September 3, 2020

David R. Broderdorf, Esq.
Lauren Emery, Atty.
Morgan Lewis & Bockius, LLP
1111 Pennsylvania Ave NW
Washington, DC 20004-2541

Re: Tesla Motors Inc
Case 01-CA-262242

Dear Mr. Broderdorf and Ms. Emery:

This is to advise you that I have approved the withdrawal of the charge in the above matter.

Very truly yours,

Michael C. Cass

Michael C. Cass
Officer in Charge

cc: Tesla Motors Inc
3500 Deer Creek Road
Palo Alto, CA 94304

(b) (6), (b) (7)(C)